Krakowskie Studia z Historii Państwa i Prawa
2018; zeszyt specjalny, wersja anglojęzyczna (english version), s. 1–28
doi:10.4467/20844131KS.18.029.9117
www.ejournals.eu/Krakowskie-Studia-z-Historii-Panstwa-i-Prawa

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Usucapio pro herede in *The Institutes* of Gaius*

Abstract

Roman legal sources concerning usucapion in place of an heir (*usucapio pro herede*) are not numerous. We will only find a relevant fragment in the second commentary of Gaius' *Institutiones* and a short text *Pro herede vel pro possessore* in the 41st book of Justinian's *Digesta*. The paper focuses on the exegesis of the first of the sources. According to the institution of usucapion in place of an heir, anybody who possessed any goods belonging to an inheritance could acquire the inheritance within a year. Therefore, the main purpose of the institution seemed to be determining who was going to be responsible for continuing the domestic worship (*sacra familiaria*). When the *sacra* had lost their social significance, *usucapio pro herede* changed its subject to the goods that belonged to an inheritance, not the inheritance as such. In classical Roman law, usucapion in place of an heir started to be considered a dishonourable legal institution. Emperor Hadrian marginalised *usucapio pro herede* through a decree of the senate sponsored by him. The *senatus consultum* made usucapion possible to reverse by the actual heir. Emperor Marcus Aurelius introduced a new crime, the *crimen expilatae hereditatis*, which consisted in taking over goods that belonged to someone else's inheritance. However, *usucapio pro herede* was never abolished in a legal act.

Keywords: usucapion, *usucapio*, heir, inheritance, goods belonging to an inheritance, acquisition, Roman legal sources, Gaius

Introduction

Usucapion is a specifically Roman institution. This is particularly clear when we compare Roman law with Germanic laws, which did not recognise usucapion. The sources contain two quite late classical definitions of usucapion. The first, from the *Tituli ex*

* Polish text: Usucapio pro herede *w "Instytucjach" Gaiusa*, "Cracow Studies of Constitutional and Legal History" 2017, vol. 10, issue 2, pp. 213–240; DOI 10.4467/20844131KS.17.011.7555. Author's ORCID: 0000-0002-0681-2865.

corpore Ulpiani, post-classical extracts of Ulpian's writings by an anonymous compiler, reads: *Usucapio est autem dominii adeptio per continuationem possessionis anni vel biennii: rerum mobilium anni, immobilium biennii* ("Usucapion is the acquisition of ownership through continuous possession for one or two years: one year for chattels and two years for immovables"[1]). The second definition can be found in Justinian's *Digest*, in one of the introductory sentences of the title on usucapion and ways of interrupting usucapion.[2] The author of the second definition was Modestinus, a student of Ulpian, who was regarded as the last great Roman jurist. This definition is almost exactly the same as the first one, with the exception that the period of usucapion is not specified[3]: *Usucapio est adiectio dominii per continuationem possessionis temporis lege definiti* (Modestinus, book 5 of *Pandects*, "Usucapion is the addition of ownership by means of continuous possession for a time prescribed by law"[4]). There is agreement as to the general purposes of usucapion, which basically consisted in changing the legal status of an estate to match the actual state of its long-term, peaceful possession. As a result, endless ownership disputes were avoided,[5] and ownership was easy to prove if there was a trial.[6] The evidentiary function was, incidentally, probably the original purpose of usucapion.[7] *Usucapio pro herede*, usucapion in place of an heir, was a particular type of usucapion.[8] One of the two main sources of our knowledge about this institution is *The Institutes* of Gaius. The other is the fifth title of the 41st book of Justinian's *Digest*, *<Usucapio> pro herede vel pro possessore*. The fragment of *The Institutes* in question is contained in book 2 of the famous textbook, in the part on acquiring and disposing of things, in the longer description of the institution of usucapion as such. The description of the institution of usucapion is included in fragments from G. 2.41 to G. 2.51 and from G. 2.59 to G. 2.61, and the description of usucapion in place of an heir is in fragments from G. 2.52 to G. 2.58. Even a comparison of just the length of the texts draws attention to the specific nature of the institution in question, especially since Gaius does not distinguish other titles of

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[1] UE 19.8, *in fine*.

[2] D. 41.3. *De usurpationibus et usucapionibus*. Justinian's compilation in the entire text quoted from: *Corpus iuris civilis*. *Institutiones et Digesta*, eds. Th. Mommsen, P. Krueger, Berolini 1928; *Corpus iuris civilis*. *Codex Iustinianus*, ed. P. Krueger, Berolini 1906.

[3] Pasquale Voci holds that Modestinus' definition is a direct repetition of Ulpian's one, with the omission of the specific period of usucapion, and that the words *temporis lege definiti* were added by the compilers. Cf. P. Voci, *Modi di acquisto della proprietà. Corso di diritto romano*, Milano 1952, p. 159.

[4] D. 41.3.3. (English translations of all fragments from *The Digest of Justinian*, vol. 1–4, ed. A. Watson, Philadelphia 1998).

[5] Cic. *Caecin*. 26.74; D. 41.10.5 pr. Neratius, book 5 of *Parchments*.

[6] G. 2.44; D. 41.3.1. Gaius, book 21, *On the Provincial Edict*.

[7] W. Litewski, *Rzymskie prawo prywatne*, Warszawa 2003, p. 339.

[8] As Constantin St. Tomulescu notes, *pro herede* can be translated as "in place of an heir" ("instead of an heir"), "on the basis of the title of heir" or "as heir". The author convincingly shows the nonsensicality of the second and the imprecision of the third translation, while he favours the first one in the context of *usucapio pro herede*. In this analysis, following in the footsteps of the Romanian scholar, I will be using the translation "in place of an heir" and analogous ones in the case of the other types of usucapion with the preposition *pro*. Cf. C.St. Tomulescu, *Gaius 2,55 e l'«usucapio pro herede»* [in:] *Studi in onore di Giuseppe Grosso*, vol. 4, Torino 1971, pp. 442–444.

usucapion in his work, such as *pro emptore* or *pro donato*, which are scrupulously listed by Justinian's compilers in the successive titles of the 41st book of the *Digest*.[9]

The specificity of *usucapio pro herede*

Thanks to Gaius' fondness for historical digressions,[10] the text contains not only a description of the construction of usucapion in place of an heir from the 2nd century AD, but also some valuable information on the archaic form, which had been abandoned before the jurist's activity.[11] Therefore, the jurist's text can be used to compare the two forms and ask about their mutual relation, as well as the values behind each of them. Let us cite Gaius himself:

> G. 2.52: *Rursus ex contrario accidit, ut qui sciat alienam rem se possidere, usucapiat, velut si rem hereditariam, cuius possessionem heres nondum nactus est, aliquis possederit; nam ei concessum est usucapere, si modo ea res est, quae recipit usucapionem: quae species possessionis et usucapionis pro herede vocatur.*[12]
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> G. 2.52: On the other hand, there are cases where one who knows that he is in the possession of another's property will acquire it by usucapio. Thus, where a man takes possession of a thing which belongs to an inheritance, but of which the heir has not yet obtained possession, he is allowed to acquire it by usucapio, provided that it is a thing that is susceptible of usucapio. This kind of possession and usucapio is termed *pro herede* (as heir).

In the fragment preceding this sentence Gaius, discussing usucapion, presents two necessary conditions: the possessor was in good faith and the property had not been stolen.[13] To illustrate his lecture, he quotes a case in which someone obtained the pos-

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[9] The headings of the successive titles of the book in question are: D. 41.4. *Pro emptore*; D. 41.5. *Pro herede vel possessore*; D. 41.6. *Pro donato*; D. 41.7. *Pro derelicto*; D. 41.8. *Pro legato*; D. 41.9. *Pro dote*; D. 41.10. *Pro suo*.

[10] W. Litewski, *Jurysprudencja rzymska*, Kraków 2000, pp. 101, 142. A well-known Polish Romanist, Stanisław Wróblewski, cautions against overestimating Gaius as a historian of law, but he considers Gaius' historical remarks on *usucapio pro herede* to be unquestionable. Cf. S. Wróblewski, *Usucapio pro herede*, "Czasopismo Prawnicze i Ekonomiczne" 1923, vol. XXI, no. 1–6, p. 221.

[11] In the rest of the text, I will be referring to usucapion in place of an heir in the form described by Gaius as "classical" and in the form which had earlier been abandoned as "archaic". These terms are purely descriptive and mean that the former functioned in the classical period of Roman jurisprudence, while the latter did not any more. Giovanna Coppola Bisazza sees it fit to refer to the earlier form as *usucapio hereditatis*, and to the later one as *usucapio pro herede*. Cf. G. Coppola Bisazza, «*Usucapio pro herede*» – «*aditio hereditatis*». *Un rapporto da chiarire*, RDR 2011, vol. 11, p. 1.

[12] In the entire analysis the Latin text of *The Institutes* of Gaius and other pre-Justinian sources is quoted from: *Fontes iuris romani antejustiniani*. *Pars altera. Auctores*, ed. J. Baviera, Florentiae 1968, pp. 9–192. All English translations of *Institutiones*: F. De Zulueta, *The Institutes of Gaius.* Part I: *Text with critical notes and translation*, Oxford 1946.

[13] G. 2.51: *Fundi quoque alieni potest aliquis sine vi possessionem nancisci, quae vel ex neglegentia domini vacet, vel quia dominus sine successore decesserit vel longo tempore afuerit; quam si ad alium bona fide accipientem transtulerit, poterit usucapere possessor: et quamvis ipse, qui vacantem possessionem nanctus est, intellegat alienum esse fundum, tamen nihil hoc bonae fidei possessori ad usucapionem nocet, <cum> improbata sit eorum sententia, qui putaverint furtivum fundum fieri posse.* "It may happen also that a man

session of an estate without using force against its owner.[14] Therefore, the situation is not subject to the *lex Iulia et Plautia*,[15] according to which a thing cannot be usucapted even by a possessor in good faith if it had been taken away from the owner using force. At the same time, this is not a case of theft because – in accordance with the victorious opinion of the jurisprudence – an estate cannot be the subject of theft. This is an important circumstance because according to the Law of Twelve Tables (T. 1.22)[16] and the *lex Atinia*,[17] a stolen thing cannot be usucapted.[18] The possessor is in bad faith, as he is fully aware that he is not the owner. However, if he gives the estate to a third person, this person will possess it in good faith, thus meeting the basic requirement of usucapion. In this way, Gaius illustrates two requirements of usucapion: the usucapted thing had not been stolen and the possessor took possession of the thing in good faith. It is worth noting that to Gaius the first and fundamental factor is the possessor's good faith. The jurist presents in G. 2.49 a case of a stolen thing: this thing cannot be usucapted either by the thief or by a third person who is in good faith. What is remarkable, however, is the justification of why such a thing cannot be usucapted by the thief: after all, he can be accused not only of bad faith but also, obviously, the possession of the stolen thing. The author clearly notes, however:

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may without violance take possession of another's land, which is lying vacant, either through the owner's neglect, or because the owner has died without a successor or has been absent for a considerable time; if the taker transfers this possession to one who receives it in good faith, the transferee will be able to acquire the land by usucapio; and even though he who took the vacant possession knows that the land is another's, this is no obstacle to usucapio by the *bona fide* possessor, since the opinion once held that land can be stolen has been exploded".

[14] G. 2.45: *Sed aliquando etiamsi maxime quis bona fide alienam rem possideat, non tamen illi usucapio procedit, veluti si quis rem furtivam aut vi possessam possideat*; *nam furtivam lex XII tabularum usucapi prohibet, vi possessam lex Iulia et Plautia.* "Sometimes, however, a party who possesses property in the utmost good faith still cannot acquire the same by usucaption; for instance, where he has possession of an article which has been stolen or obtained by violence, for the Law of the Twelve Tables forbids stolen property to be acquired by usucaption, and the *Lex Julia et Plautia* makes the same provision with reference to property obtained by force".

[15] Gaius mentions one *lex*, although his statement in fact probably refers to the *leges Iuliae de vi publica et privata* and the *lex Plautia de vi*. Cf. G. Longo, s.v. *Lex Julia de vi publica e Lex Julia de vi privata (Leges Juliae de vi publica et privata)* and *Lex Plautia de vi* [in:] *Novissimo Digesto Italiano*, vol. 9, eds. A. Azara, E. Eula, Torino 1963, pp. 812, 815–816 and bibliography.

[16] *Ibidem*, […] *nam furtivam lex XII tabularum usucapi prohibet* […].

[17] D. 41.3.33 pr. Julianus, book 44 of the *Digest*; D. 41. 3.4.6. Paulus, book 54 *On the Edict*.

[18] The text of the *lex Atinia* was recorded by Aulus Gellius in the *Noctes Atticae* 17.7.1: *Legis veteris Atiniae verba sunt: quod subruptum erit, eius rei aeterna auctoritas esto.* "Whatever shall have been stolen, let the right to claim the thing be everlasting". (English translation quoted from Aulus Gellius, *Attic Nights*, ed. John C. Rolfe, http://www.perseus.tufts.edu/hopper/text?doc=Gel.+17.7&fromdoc=Perseus%3Atext%3A2007.01.0072, access: 24 August 2018). His account, as incomplete, is supplemented with Paulus' opinion in D. 41.3.4.6. Paulus book 54 *On the edict*: *Quod autem dicit lex Atinia, ut res furtiva non usucapiatur, nisi in potestatem eius, cui subrepta est, revertatur, sic acceptum est, ut in domini potestatem debeat reverti, non in eius utique, cui subreptum est.* "Now, when the lex Atinia says that a stolen thing can be usucapted only if it has first returned into the power of the person from whom it was appropriated, this is to be interpreted as meaning that it must return into the power of its actual owner, not into that of the person from whom it was in fact taken". It is commonly accepted that the Law of the Twelve Tables introduced a ban on usucapion of a stolen thing, while the later *lex Atinia* upheld it, at the same time allowing the usucapion of a stolen thing if it had been returned to its owner. For the requirement of no theft and controversies as to the dating and scope of the *lex Atinia* see P. Voci, *Modi di acquisto…*, p. 161 ff.

> G. 2.49: *Quod vulgo dicitur furtivarum rerum* […] *usucapionem* […] *prohibitam esse, non eo pertinet, ut ne ipse fur* […] *usucapere possit (nam huic alia ratione usucapio non competit, quia scilicet mala fide possidet)*.
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> The saying that the usucapio of things stolen [...] is forbidden by the law of the Twelve Tables does not mean that the actual thief [...] is unable so to acquire (for to him usucapio is closed for another reason, namely that he possesses in bad faith).

Gaius believes that the test of good faith is logically more primary, followed later by the requirement of the thing not being faulty, i.e. stolen. This is different in the famous medieval hexametre, which in the first place emphasised the characteristics of the thing which was to be usucapted.[19] It is true that in the poetic metre *res habilis*, *titulus*, *fides*, *possession* and *tempus* presented the commonly accepted conditions of usucapion in the law of Justinian's times.

In the above quotation from *The Institutes*, the jurist gives another example using contrast (*rursus*) with the requirement of good faith; this time, he illustrates usucapion in bad faith. *Usucapio pro herede* in the form contemporary to Gaius, i.e. in the second half of the 2nd century AD, is an exception to the requirement of good faith in cases of usucapion.[20] The configuration of this *usucapio* is as follows: a third person (*aliquis*) usucapts a thing which belongs to the inheritance (*rem hereditariam*), unless the heir (*heres*) obtained possession of it. The usucaptor knows, of course, that the thing does not belong to him and that he has no basis to think otherwise; therefore, he is a possessor in bad faith. This eliminates the primary requirement of usucapion according to Gaius; which leaves secondary ones, i.e. first of all the requirement of a lack of theft. Let us recall, however, that an estate – the most valuable part of an inheritance – could not be the subject of theft. Therefore, it was not protected against theft. Moreover, although the jurisprudence did not have a unanimous opinion on the nature of an inheritance which had not been accepted, a so-called vacant inheritance (*hereditas iacens*),[21] until the early 3rd century AD it was commonly thought that all property which belonged to a vacant inheritance belonged to nobody, and therefore could not be stolen by means of appropriation.[22] It is accepted that *heredes sui* gained possession of the deceased's things at the time of

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[19] For the history of the development of mnemonic formulae concerning the requirements of usucapion in Roman and canon law see E.J.H. Schrage, *Res habilis, titulus, fides, possessio, tempus: A medieval mnemonic hexameter?* [in:] *Liber amicorum Guido Tsuno*, ed. F. Sturm, Frankfurt am Main 2013, pp. 325–339. Cf. W. Dajczak, T. Giaro, F. Longchamps de Bérier, *Prawo rzymskie. U podstaw prawa prywatnego*, Warszawa 2009, p. 385.

[20] W. Litewski, *Jurysprudencja…*, p. 65.

[21] Cf. for instance the different opinion of Neratius, quoted by Paulus in D. 47.19.6 (Paulus, book 1, *On Neratius*), in which he regarded the taking of an inherited thing as theft unless the person taking it did not know that the thing was part of an inheritance and did not belong to a living person. The British scholar Geoffrey Mac Cormack believes that until Neratius' times the conclusion of any type of *usucapio pro herede* was probably *aditio*, not the heir taking possession of the things belonging to the inheritance. G. Mac Cormack, *Usucapio pro herede, res hereditariae and furtum*, RIDA 1978, vol. 25, p. 300.

[22] W. Osuchowski, *Hereditas iacens*. *Poglądy jurydyczne na istotę spadku leżącego w rzymskim prawie klasycznym i justyniańskim* [in:] *Rozprawy prawnicze. Księga pamiątkowa dla uczczenia pracy naukowej Kazimierza Przybyłowskiego*, Warszawa–Kraków 1964, p. 213. Regardless of the issue of the delict of theft, Marcus Aurelius introduced the *crimen expilatae hereditatis* (D. 47.19).

opening the estate,[23] which would protect them against classical *usucapio pro herede*, in contrast to *heredes extranei*, who were not protected until they gained possession of the things belonging to the inheritance. From that moment forward taking *res hereditariae* meant committing theft and running the risk of facing an *actio furti*.[24] It follows from the above that in the classical form of *usucapio pro herede* any *heres extraneus*, unless he showed good reflexes and promptly took possession of the inheritance, could within a relatively short period of time lose even all elements of the inheritance, condemning himself to an *inane nomen heredis* (G. 2.224) and possible inheritance debts, similarly to the situation of exhausting the entire inheritance by legacies. In such a case, the law interfered, more or less successfully, on behalf of the heir. Firstly, we should mention the *lex Falcidia*, a *plebiscitum* enacted in 40 AD.[25] On this basis, legacies basically could not exceed three quarters of the inheritance; if they did exceed this limit, the heir was entitled to decrease them proportionately. In any case, the heir was left with at least one quarter of the inheritance. However, the position of the heir in classical *usucapio pro herede* was completely different, as he was deprived of any means to protect his interests. It is therefore unsurprising that in the later part of his commentary Gaius judges the institution quite harshly, going so far as to call it *inproba possessio et usucapio* (G. 2.55), "thoroughly dishonourable possession and usucaption".

Further on in his commentary, Gaius provides more details on classical *usucapio*, adding more information about the elements of the construction:

> G. 2.53: *Et in tantum haec usucapio concessa est, ut et res, quae solo continentur, anno usucapiantur.* 54 *Quare autem hoc casu etiam soli rerum annua constituta sit usucapio, illa ratio est, quod olim rerum hereditariarum possessione uelut ipsae hereditates usucapi credebantur, scilicet anno. Lex enim XII tabularum soli quidem res biennio usucapi iussit, ceteras uero anno: ergo hereditas in ceteris rebus uidebatur esse, quia soli non est, quia neque corporalis est. <Et> quamuis postea creditum sit ipsas hereditates usucapi non posse, tamen in omnibus rebus hereditariis, etiam quae solo tenentur, annua usucapio remansit.*[26]
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> So liberally is this kind of usucapion allowed, that even land is thereby acquired in one year. The reason why in this case usucapion of land as well as of other things in one year is admitted is that in former times through the possession of things comprised in an inheritance the inheritance itself was deemed to be acquired by usucapion. and this in one year. For the law of the Twelve Tables laid down that lands should be acquired by usucapion in two years and other things in one. Thus an inheritance, not being land, indeed non even corporal, was held to be among other things. And though later it was held that an inheritance itself could not be acquired by usucapion, yet usucapion in one year survived for everything, including land, comprised in an inheritance.

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[23] F. Longchamps de Bérier, *Law of Succession: Roman Legal Framework and Comparative Law Perspective*, Warszawa 2011, p. 90.

[24] G. Mac Cormack, *Usucapio…*, p. 297. Jerzy Krzynówek emphasises the connection between the notion of theft and the existence of *usucapio pro herede*. Cf. J. Krzynówek, *Uwagi do "usucapio lucrativa" G.2.52–61*, "Studia Iuridica" 2003, vol. XLI, pp. 156–157. Cf. G. 3.201; D. 41.3.29.

[25] F. Longchamps de Bérier, *Law…*, pp. 141–142.

[26] Giovanna Coppola Bisazza believes the most probable wording of the text is: […] *quod olim rerum hereditariarum possessiones ut ipsae hereditates usucapi credebantur* […]. Cf. G. Coppola Bisazza, *Studi sulla pro herede gestio. La struttura originaria del „gerere pro herede"*, Milano 1987, pp. 74–75 with bibliography.

The fragment previously quoted in its entirety presented the lack of the requirement of good faith as the fundamental difference between *usucapio pro herede* and the other forms of usucapion. The fragment quoted here draws attention to the exceptional, very short period of usucapion; a year, also in the case of immovables which were part of the inheritance. The question arises: why were immovables not subject to the two-year period of usucapion normal in Roman law? Gaius, justifying this unorthodox solution, only quotes the example of the Law of the Twelve Tables. He does not offer any commentary, or attempt to find the cause and effect between the regulation in the Law and the one contemporary to him. It seems, however, that the very reference to the Law may, in the given context, perform the function of a historical argument, which incidentally was quite rare in the discourse of Roman jurists.[27] Namely, according to Gaius, the Law of the Twelve Tables specified the two-year period only for immovables, that is – *a contrario* – since the inheritance itself (even one comprising an immovable) is not an immovable, it should be given a year-long period of usucapion. The author makes some mental shortcuts in a very laconic way: he moves from an inherited thing (immovable) to the inheritance, which includes this thing. The inheritance is shown as a whole which can be usucapted. Presenting his readers with the historical perspective on the discussed institution (*olim*), he describes its older, archaic form. The subject of this older form of *usucapio pro herede* were not, as in Gaius' times, *res hereditariae*, but the *hereditas* itself. This difference has really far-reaching consequences. As Gennaro Franciosi notes, the term *hereditas* comes from *heres*, not the other way around.[28] What this means is that originally, *hereditas* might have been simply a term for obtaining the position of an heir. It is commonly accepted that archaic *usucapio pro herede* resulted in obtaining the title of *heres*, i.e. acquiring the *hereditas*[29] with all its consequences, such as inheritance debts and succession to the family *sacra*, i.e. the domestic cult. A remnant of this state of things in the Classical Period was the requirement that the person usucapting *pro herede* had a right to make a testament, although at that time he no longer acquired the inheritance.[30] After acquiring the inheritance the heir becomes the owner of all the things belonging to the inheritance and no other heir needs to be found; the purpose of succession is achieved, therefore it is not possible for another person to acquire the title of *heres* by means of archaic *usucapio* after the *heres* accepts the inheritance. This refers mainly to testate heirs; the problem of intestate heirs was different. Firstly, we should note that according to the Law of the Twelve Tables, the *heres suus* acquired the inheritance by operation of law, without having to take any initiative.[31] Therefore, archaic *usucapio* only put testate and intestate heirs *extranei* in danger of losing the entire inheritance, unless they performed the *aditio* within a year, which was the period of *usucapio pro herede*. It seems

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[27] T. Giaro, s.v. *Gaius* [in:] *Brill's New Pauly Encyclopaedia of the Ancient World*, vol. 5, eds. H. Cancik, H. Schneider, Leiden–Boston 2004, pp. 643–644.

[28] G. Franciosi, *Usucapio…*, p. 52.

[29] *Ibidem*, p. 6 with bibliography; for the polemic with lone voices, see especially E.F. Bruck, Über römisches Recht im Rahmen der Kulturgeschichte, Berlin 1954, p. 40; G. Scherillo, *Successione ed estizione dei rapporti giuridici* [in:] *Studi in onore di G.M. De Francesco*, vol. 2, Milano 1957, p. 612.

[30] D. 41.5.4. Paulus, book 5, *On the Lex Julia et Papia*: *Constat eum, qui testamenti factionem habet, pro herede usucapere posse.* "It is settled that one who has *testamenti factio* [as heir] can usucapt as heir".

[31] F. Longchamps de Bérier, *Law…*, p. 93.

that in this way the heir could secure his interests much easier than by taking separate inherited things into his effective possession, as was the case in classical *usucapio pro herede*. All these conflicts of interest do not appear at all in the case of the *hereditas iacens*, so the situation seems more appropriate for using the institution in question.

The understanding of the term *hereditas*

At this point it is worth remarking on the subject of archaic *usucapio pro herede*. Gaius puts the *hereditas* in the category of *res incorporales*.[32] However, a similar opinion certainly cannot be ascribed to representatives of the pontifical jurisprudence,[33] because the term *res incorporalis* was probably first introduced into the legal terminology by Gaius in his textbook; in any case, the term did not catch on in the analyses of jurists of the Classical Period.[34] Originally, it emerged in the sphere of philosophy, from which it did not start to spread to other areas of language until the 1st century AD.[35] It is also impossible to assume that Greek philosophy had such a considerable influence on the Roman mentality in the Archaic Period.[36] However, as G. Franciosi noted, the archaic *hereditas* was not understood as a *res corporalis*. A thing is *corporalis* in relation to another one, which is *incorporalis* and vice versa; such a distinction cannot be applied in a period when it did not exist.[37] Therefore, a serious question arises as to how the *hereditas* could become the subject of usucapion during the period when the juristic thought did not yet function on a sufficiently abstract level to be able to make such a distinction. It seems that in the Archaic Period the *hereditas* could not be understood as an immaterial entity, a separate whole which was possible to usucapt, since even Cicero in the 1st century AD sees things inaccessible to the senses as, in a way, non-existing (*non esse*)[38]:

> Cic. *Top.* 5.27: *Esse ea dico quae cerni tangique possunt, ut fundum aedes, parietem stillicidium, mancipium pecudem, supellectilem penus et cetera* […]. *Non esse rursus ea dico quae tangi demonstrarive non possunt, cerni tamen animo atque intellegi possunt, ut si usus capionem, si tutelam, si gentem, si agnationem definias, quarum rerum nullum subest* [*quasi*] *corpus, est tamen quaedam conformatio insignita et impressa intellegentia, quam notionem voco*.[39]

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[32] G. 2.14 pr.: *Incorporales sunt quae tangi non possunt, qualia sunt ea quae in iure consistunt, sicut hereditas ususfructus obligationes quoquo modo contractae*. "Incorporeal are things that are intangible, such as exist merely in law, for example an inheritance, a usufruct, obligations however contracted".

[33] Getting ahead of our line of argument, it should be said that archaic *usucapio pro herede* was probably created after the Law of the Twelve Tables was passed, during the activity of the pontifical jurisprudence.

[34] W. Dajczak, *Rzymska res incorporalis a kształtowanie się pojęć «rzeczy» i «przedmiotu praw rzeczowych» w europejskiej nauce prawa prywatnego*, Poznań 2007, p. 23.

[35] *Ibidem*, p. 42.

[36] Cf. W. Litewski, *Jurysprudencja…*, p. 102: "Generally, from the mid-2nd century BC onwards the educated Romans were versed in philosophy".

[37] G. Franciosi, *Usucapio…*, p. 39.

[38] W. Dajczak, *Rzymska res incorporalis…*, p. 25.

[39] The text was quoted in: *M. Tulli Ciceronis Rhetorica*, vol. 2, ed. A.S. Wilkins, Oxford 1903.

> By things that exist I mean such as can be seen and touched: for example, farm, house, wall, rainwater, slave, animal, furniture, food etc. [...] On the other hand, by things which do not exist I mean those which cannot be touched or pointed out, but can, for all that, be perceived by the mind and comprehended; for example, you might define acquisition by long possession, guardianship, gens, agnation; of these things there is no body, but a clear pattern and understanding impressed on the mind, and this I call a notion.[40]

Another intuition which may come in handy when answering the question about the understanding of the *hereditas* as the subject of usucapion is the case of a herd as a single object of law, which appears in jurists' reflections.[41] Elsewhere in *The Institutes*, in a section on the *per legis actiones* proceedings, we will find a fragment on the fact that in the *vindicatio* process the claimed thing had to be brought in by the praetor; if this was inconvenient, at least a piece or fragment of the thing had to be brought in.[42] This example proves that at least during the time the *per legis actiones* proceedingsfunctioned, a herd could be the subject of the *vindicatio* process. According to Jürgen Hammerstein, this different treatment of a herd of cattle stemmed from the economic practice in Archaic Rome.[43] This treatment of a herd was an exception, however, as a similar solution would not have been practical for other sets of things.[44] It did not, in any way, follow from the influence of Greek philosophy, e.g. Stoicism. On the contrary, it precedes its influence on Roman society by a few centuries.[45] We can therefore ask whether the *hereditas* was not treated in an analogous way, i.e. whether the economic need did not force the treatment of things belonging to an inheritance as one set. This hypothesis is probably baseless. Firstly, there are no sources to support such an analogy. Secondly, if we assume the secondary nature of acquiring the *hereditas* to acquiring the title of *heres*, this hypothesis would be contrary to this assumption, placing the spotlight on the former element.

G. Franciosi proposes an interesting and convincing solution to this problem. He disagrees with the opinion that the *hereditas* was originally a set of things or that it was understood as a *res corporalis*.[46] The Italian Romanist instead emphasises personal elements of both usucapion (in the archaic version as simple *usus*) and succession. Firstly, he shows that what was obtained through *usus* was not abstract ownership but the personal use of a thing.[47] Moreover, Roman law in its oldest version made it possible to hold personal power over people as well. As his key argument, G. Franciosi quotes marriage accompanied by obtaining the *manus* over the wife through *usus*. Remarkably, the period

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[40] English translation: Cicero, *De inventione. De optimo genere oratorum. Topica*, with an English translation by H.M. Hubbel, London 1960.

[41] See: W. Dajczak, *Rzymska res incorporalis…*, p. 50 ff.

[42] G. 4.17: *Si qua res talis erat, ut sine incommodo non posset in ius adferri vel adduci, veluti si columna aut navis aut grex alicuius pecoris esset* […]. "If the thing was such as could not be carried or led into court without inconvenience – for example, if it was a column or a ship or a flock or herd […]".

[43] W. Dajczak, *Rzymska res incorporalis…*, p. 55.

[44] J. Hammerstein, *Die Herde im römischen Recht. Grex als rechtliche Sachgesamntheit und Wirtschaftseinheit*, Göttingen 1975, p. 11. Quoted and examined in: W. Dajczak, *Rzymska res incorporalis…*, p. 55.

[45] W. Dajczak, *Rzymska res incorporalis…*, p. 54.

[46] The view was especially supported by B. Albanese. According to him, the change from archaic to classical *usucapio pro herede* consisted in altering the idea of the *hereditas* from *corporalis* to *incorporalis*. Quoted in G. Franciosi, *Usucapio…*, p. 167 ff.

[47] *Ibidem*, p. 181.

of this peculiar "usucapion" was also a year, similarly to the typical usucapion of a thing or the *hereditas*. Incidentally, this proves the ancient origin of *usus* with a one-year period (also as a prototype of *usucapio pro herede*), older than the Law of the Twelve Tables. The Law on the one hand assumes the possibility of entering a marriage in this way and extending the husband's *manus* to his wife, and it only introduces the institution of *usurpatio trinoctii*, which enabled the wife to purposefully not become the subject of "usucapion" and not come under her husband's power.[48] On the other hand, Franciosi argues, if an inheritance included only individual inherited things, and the *hereditas* was possibly understood as a single set of such things, it would still fail to explain the phenomenon of the deceased's obligations and *sacra* passing to the *heres*.[49]

Among the motives for introducing ancient *usucapio pro herede*, Gaius especially emphasises the historical significance of the continuity of the domestic cult (G. 2.55: […] *quorum illis temporibus summa observatio fuit*). The cult is so important that the *hereditas* cannot exist without it.[50] These two examples clearly show the priority of personal over financial elements in inheritance in the Archaic Period, and the *hereditas* should be understood as an extension of the personal situation *de cuius*. Combining the two arguments: since the *heres* – by accepting the title – obtains the testator's entire personal situation (rather than only acquiring *res hereditariae*), consequently the *hereditas* as the entire personal situation of the deceased may be the subject of *usus* in the form of archaic *usucapio pro herede*. It seems, therefore, that a similar reading of the *hereditas* enables us to avoid its anachronistic understanding in the categories of *res corporalis* and *res incorporalis*. Their alternative emerged much later, after all. In this understanding, claims G. Franciosi, the *hereditas* was neither *res corporalis* nor *res incorporalis*.[51]

The question remains why – despite the fundamental change in the model of usucapion from archaic to classical – the new institution maintained the previous period of one year. After all, in the classical model it no longer has a logical basis with regard to usucapion of immovables belonging to the inheritance, which would normally require a two-year period. This longer period does ensure more effective protection of the heir's interests. However, Gaius does not justify this in any way. He only specifies that the one-year period of usucapion was binding in previous, archaic *usucapio*. Clearly, for the Roman jurist the *status quo* was a sufficient argument for maintaining it.[52] At the

[48] G. 1.111: *Itaque lege XII tabularum cautum est, ut si qua nollet eo modo in manum mariti convenire, ea quotannis trinoctio abesset atque eo modo <usum> cuiusque anni interrumperet.* "Hence it was provided by the Twelve Tables that any woman wishing not to come under her husband's *manus* in this way should stay away from him for three nights in each year and thus interrupt the *usus* of each year".

[49] G. Franciosi, *Usucapio…*, p. 34 ff.

[50] As an orally-transmitted principle *nulla hereditas sine sacris*. W. Litewski, *Jurysprudencja…*, p. 122, without quoting sources.

[51] G. Franciosi, *Usucapio…*, p. 184.

[52] A similar example of conservatism characteristic for the Roman jurisprudence can be found in the *senatus consultum* of 49 AD, in which Emperor Claudius permitted an uncle to marry his niece, lifting the prohibition against marriage between relatives up to the fourth degree of kinship. The reason for the decree were Claudius' private plans with regard to such a marriage. The decree remained in force in this – fragmentary, casuistic – form for almost three centuries. Cf. W. Dajczak, T. Giaro, F. Longchamps de Bérier, *Prawo rzymskie…*, p. 217.

same time, this point clearly shows that the Romans lacked the propensity for creating a system[53] – even Gaius, who, as a teacher, had a fondness for creating new distinctions.[54]

The purposes of introducing and changing the model of *usucapio pro herede*

In the next fragment, the jurist presents the purposes of introducing the institution in question:

> G. 2.55: *Quare autem omnino tam inproba possessio et usucapio concessa sit, illa ratio est, quod uoluerunt ueteres maturius hereditates adiri, ut essent, qui sacra facerent, quorum illis temporibus summa obseruatio fuit, ut et creditores haberent, a quo suum consequerentur.* 56. *Haec autem species possessionis et usucapionis etiam lucratiua uocatur: nam sciens quisque rem alienam lucri facit.*
>
> That so dishonest a possession and usucapion should have been allowed at all is explained by the fact that the ancient lawyers wished inheritances to be accepted promptly, in order that there should be persons to carry on the family cults (sacra), to which the greatest importance was attached in those days, and in order that the creditors (of the inheritance) should have someone from whom to obtain their due. This kind of possession and usucapion is also termed lucrativa (gainful), because by it a man knowingly makes gain out of another's property.

The very beginning of the quoted fragment includes a strong expression, which enables us to guess how Gaius' readers and himself see the institution of *usucapio pro herede*: it is dishonourable (*inproba*). Another word which Gaius uses to describe the institution is the adjective *lucrativa*. The profit in question is not ethically neutral, since *lucrum* in the understanding of Roman jurists is, according to Jerzy Krzynówek, "an undue, undeserved profit, which is subject to a return or division, and which follows from a legal act or emerges in relation to a contract or a legal act".[55] This is a very definitive moral evaluation. It seems that it is mainly based on the possibility of depriving the *heres extraneus* of the entire inheritance during a short period of usucapion, especially if he is far away from the location of the estate or does not know about his appointment to inheritance. Why and how, then, was such a faulty institution created at all? Clearly the motives which gave an impulse to its creation overcame the disadvantages of this solution, or else serious drawbacks appeared later on. First of all, in his evaluation Gaius does not distinguish between the functioning of archaic and classical *usucapio pro herede*, or alternatively deliberately evaluates both these forms as *inproba*. In my opinion, there are no sufficient grounds to hold such a strict opinion about the consequences of archaic *usucapio*. It is more likely that the author extended his opinion about the institution contemporary to him to the past.

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[53] *Ibidem*, pp. 67–68.

[54] W. Litewski, *Jurysprudencja…*, pp. 111, 142.

[55] J. Krzynówek, *Uwagi…*, p. 153.

According to Gaius, it was the *veteres* who started the institution. The term refers to the old, probably pontifical, jurisprudence.[56] A more precise dating of the introduction of archaic *usucapio pro herede* is impossible on the basis of the available sources. The French scholar Pierre Collinet estimated that it emerged in the 2nd century BC.[57] G. Franciosi, on the other hand, gives only the general *terminus ad quem*, dated to the pontificate of Tiberius Coruncanius (254 BC).[58] Pasquale Voci considers this pontificate to be the probable time when the institution in question was created.[59]

Continuing on from the chronological reflections, we can smoothly advance towards the motives of the introduction. While the dating of the introduction of archaic *usucapio* is (like the vast majority of problems concerning archaic law) doomed to more or less correct guessing, the analogous discussion about the change of its model to the classical one is based on more solid foundations. In their debates, Romanists frequently offer arguments related both to the appearance or existence of the above-mentioned motives in Roman society (which would supposedly give rise to the archaic form of *usucapio pro herede*) and to their termination (which would supposedly lead to the change of the model). Let us therefore turn to the motives which drove the *veteres* to introduce the institution of *usucapio pro herede*. Gaius is very specific on this point: the *veteres* desired that inheritances should be accepted quickly, that domestic cults should be continued, and that creditors might have someone from whom they might collect their claims.

Numerous prominent Romanists raise various objections against Gaius' account on the subject.[60] Firstly, they note the time difference between the hypothetical period of the creation of archaic *usucapio pro herede* and the time of Gaius' activity. According to some, so many years had passed that the motives cited by the author of *The Institutes* seem to be a case of a rationalising anachronism: it is interesting, but it in no way reflects reality.[61] Others belittle the significance of the individual motives cited by Gaius for introducing the institution of archaic *usucapio pro herede* consistent with his description. Siro Solazzi raises a particularly serious doubt, openly stating that "*usucapio pro herede* was not introduced so that inheritance could be accepted faster".[62] There were other motives behind it. Many others speak less directly about a disproportion between the declared

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[56] E.g. P. Voci, *Modi di acquisto…*, p. 200; G. Franciosi, *Usucapio…*, pp. 16–17, 22–23. Pietro Bonfante, on the other hand, believes that the roots of the institution go back to the times before the Law of the Twelve Tables: P. Bonfante, *La "iusta causa" dell'usucapione e il suo rapporto colla "bona fides"* [in:] *idem*, *Scritti giuridici varii*, vol. 2, Torino 1918, p. 492. Gennaro Franciosi notes first of all that *usucapio pro herede* assumes the existence of the institution of *heres extraneus*, which was not introduced until the Law of the Twelve Tables.

[57] P. Collinet, *Les variations de l'usucapion "pro herede" avant Hadrien* [in:] *Studi in onore di Salvatore Riccobono nel XL anno del suo insegnamento*, vol. 4, Palermo 1936, p. 141.

[58] G. Franciosi, *Usucapio…*, p. 19.

[59] P. Voci, *Diritto ereditario romano*, vol. 1, Milano 1960, p. 120.

[60] Very extensive polemic literature on the subject in: G. Franciosi, *Usucapio…*, p. 54.

[61] Pietro Bonfante expresses such an opinion the most strongly, refusing to ascribe any historical value to Gaius' explanations. Cf. P. Bonfante, *Corso di diritto romano*, vol. 6: *Le successioni. Parte generale*, Roma 1930, p. 224.

[62] S. Solazzi, *Diritto ereditario romano*, vol. 1, Napoli 1932, p. 140.

purpose (faster acceptance of an inheritance) and the means applied.[63] Pietro Bonfante's ironic statement does sound very provocative indeed:

> It is absurd to claim that in order to accept [an inheritance], rather than using a direct method, such as […] setting a time limit, the Romans would allow dispossessing [heirs] of inheritance and design such a complete institution, only to destroy it little by little later, in the historical period.[64]

This pointed statement basically summarises the main complaints against the rationality of the motives given by Gaius. Rudolf von Jhering and Bernardo Albanese also believed that it would have been sufficient to set a time limit for accepting an inheritance in order to accelerate its acceptance, without the need to resort to more drastic methods.[65] It seems that such a solution was not as simple and obvious to the *veteres*. As Biondo Biondi holds, in the Archaic Period the law, praetor and jurisprudence (let us note: the pontifical jurisprudence, i.e. one dealing largely with public laws) did not have direct power over private relations yet and were unable to set such a time limit.[66] Apart from this technical problem, G. Franciosi defends Gaius' opinion from the point of view of its content. The Italian scholar was convinced that the Romanists mentioned above did not sufficiently take into account the importance of the continuation of the domestic cult. Meanwhile, although the order of inheritance followed from the Law of the Twelve Tables, the influence of the pontifical jurisprudence on the issue of inheritance was mainly reflected in the regulation of the inheritance of the *sacra*. Therefore, if we assume that the creators of usucapion in place of an heir, the *veteres*, were the pontiffs, it is rational to assume that their main motivation was concern for the cult. Moreover, setting a time limit for accepting an inheritance, even regardless of the technical issues discussed by B. Biondi, did not solve this problem because if the time limit was exceeded, the inheritance remained vacant and the cult of the deceased's family was abandoned. The only solution was to find a *heres* at any cost, or rather to appoint a *heres* by law, using accomplished facts, even at the expense of potentially wronging the *heres extraneus* appointed by the testator.

Additionally, there have been various opinions about other motives for introducing *usucapio pro herede*, not included in Gaius' text. S. Solazzi, quoted above, noted that according to the Law of the Twelve Tables in the case of an intestate inheritance neither the *agnatus proximus* nor the *gentiles* obtained the title of *heres*, but only of *ius familiae habendae*.[67] Therefore, they did not become responsible for performing the domestic cult of the deceased. According to this author, *usucapio* was introduced so that after a year of holding the *familia* either the *agnatus proximus* or the *gentiles* could obtain the title

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[63] S. Solazzi, *Diritto…*, p. 60; P. Collinet, *Les variations…*, p. 137; B. Albanese, *La successione…*, p. 282.

[64] P. Bonfante, *Corso…*, p. 226.

[65] R. Jhering, *Serio e faceto nella giurisprudenza*, Firenze 1954, p. 161; B. Albanese, *La successione…*, p. 282.

[66] B. Biondi, *Istituti fondamentali di diritto ereditario romano. Capacità, acquisto dell'eredità ed effetti, divisione*, Milano 1948, p. 116.

[67] T. 5.4–5.

of heir.[68] This opinion was frowned upon by other Romanists[69] mainly because there are no sufficient sources to establish if *usucapio pro herede* had any limitations *ratione personae*. Without such a restriction the institution of usucapion in place of an heir would seem inadequate to the purpose assumed by S. Solazzi. Pietro Bonfante presented the following viewpoint: an *extraneus*, i.e. a person from outside the family, taking actual charge of the *familia* was a kind of usurpation. With the development of the state apparatus this usurpation may have, with the passage of time, transformed into the legal title of *heres*.[70] As to the principle, it is difficult to disagree with this opinion, if we look at the institution of usucapion in general. The purpose of usucapion, after all, was to legitimise the status quo which differed from the legal status, whether for material or formal reasons.[71] This hypothesis would include all types of usucapion (not only the *pro herede* type), and it would be idle and quite banal. According to some Romanists, P. Bonfante incorrectly looked for political reasons to explain certain symptoms of the development of Roman law in the Archaic Period, i.e. in an area with the least amount of available source documents.[72] B. Biondi noted that "in no political organism is it considered normal that someone takes over unassigned power with full legal effect; it may happen as an exception and through accomplished facts, but the law cannot stipulate and regulate it".[73] Some critical remarks towards P. Bonfante's positivism, characterised by an evolutionist or dialectic attitude towards the history of law, were also included in G. Franciosi's monograph.[74]

Keeping rather closely to Gaius' interpretation and the content included explicitly in his text, the main purpose of introducing the institution in question was to entice the *heredes* instituted in testaments to accept the inheritance as quickly as possible (*maturius hereditates adiri*), i.e. finding the *heres* and forcing him to act. It seems that in no period did this purpose become obsolete: even after the subject of *usucapio pro herede* was changed to *res hereditariae*, the presence of a *heres* remained necessary, for instance as the condition of the effectiveness of legacies and *fideicomissa*. This motive is clearly different from the other two, both on the functional and linguistic level. Firstly, accepting the inheritance (*aditio*) is the basis of achieving the other two purposes, which are cultivating the domestic *sacra* and the heir becoming liable to the creditors' execution. Secondly, in G. 2.55 the Latin syntax uses a different construction to refer to the first purpose than to the other two. The first purpose is expressed by using the ACI (*accusativus cum infinitivo*) construction, which was very popular in Classical Latin.[75] The other two

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[68] S. Solazzi, *Diritto…*, p. 62. In Polish literature, this opinion is shared by Jerzy Krzynówek. Cf. J. Krzynówek, *Uwagi…*, pp. 159–160.

[69] For more on this subject see G. Franciosi, *Usucapio…*, p. 66; G. Coppola Bisazza, *Studi…*, p. 94 ff.

[70] P. Bonfante, *Corso…*, p. 227; *idem*, *Le critiche al concetto dell'originaria eredità sovrana* [in:] *idem*, *Scritti giuridici varii*, vol. 1: *Famiglia e succesione*, Torino 1916, p. 242.

[71] W. Dajczak, T. Giaro, F. Longchamps de Bérier, *Prawo rzymskie…*, p. 384.

[72] G.I. Luzzato, *Le organizzazioni preciviche e lo Stato*, Modena 1948, p. 7; G. Franciosi, *Usucapio…*, p. 68.

[73] B. Biondi, *Istituti…*, p. 117.

[74] G. Franciosi, *Usucapio…*, p. 69.

[75] ACI construction analysis: *voluerunt* – predicate, so-called *verbum regens*; *veteres* – subject; *hereditates – accusativus*; *adiri – infinitivus*.

purposes, on the other hand, were expressed in two clauses of purpose, subordinate to the clause with the ACI: *ut essent* […] *et ut haberent* […]. The word *ut* is a conjunction with a multitude of uses, one of which is to introduce a clause of purpose, i.e. the so called *ut* of purpose. The difference in constructions itself does not necessarily determine the importance of one of the clauses. However, the text undoubtedly shows the *sacra* and the creditors as the motives which are somehow parallel to each other, which in conjunction with the functional interpretation allows us to conclude that they are secondary to the main purpose, which remains finding the *heres* as quickly as possible. However, it is also possible to treat finding the *heres* not as the main purpose but as the instrumental one, which serves the other two. Gaius himself draws particular attention to the exceptional respect that the *sacra* enjoyed in the times when *usucapio* was introduced (*summa observatio*). When the *sacra* lose their special position in Roman society, the argumentation of the authors quoted above (that *usucapio pro herede* uses too drastic methods to ensure the simple purpose of a quicker acceptance of an inheritance and thus the subject of usucapion changes to the *res hereditariae*) will become valid.

It is now worth devoting some close attention to the Roman domestic cult. After the paths of religious law and civil law diverged,[76] jurists did not show interest in the former. From that moment onwards, the *sacra* were commonly treated as a traditional burden imposed on the heir, which could even exceed the value of the inheritance, if the latter was exhausted by legacies (or later by classical *usucapio pro herede*). This particular relation between inheritance and the *sacra* is perhaps best explained by the saying which functioned in Rome, recorded by Festus, among others[77]:

> *De verborum significatu* 370: *Sine sacris hereditas: sine sacris hereditas in proverbio dici solet* […] *sine ulla incommodi appendice.*[78]
>
> On the significance of words 370: An inheritance without rites: proverbially, a benefit without any inconvenient appendices used to be called "an inheritance without rites".

Festus' sentence indicates a natural connection between inheritance and the transfer of cult. It assumes that the *hereditas* functions normally *cum sacris*, while their lack is something special, something that draws attention. Secondly, the *sacra* are talked about clearly as an addition, a secondary element, which is also disadvantageous, inconvenient, *incommodum*. It is far from the *summa observatio* mentioned by Gaius.

To capture the change and to understand this connection, we must refer to Cicero's famous text in *De legibus* (2.19–20, 47–49). In his work, modelled after Plato's *Nomoi*, the Arpinate depicts the image of ideal law, or more precisely, the law of an ideal Roman republic. In the second book, he devotes a long fragment to religious law, including the principles of continuing the *sacra*. Very importantly, the author presents those principles as his own, although earlier he ascribed them to Quintus Mucius Scævola, son of Publius Mucius Scævola the Pontifex. He compares them to the previous principles of passing

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[76] W. Litewski, *Jurysprudencja…*, pp. 19, 23.

[77] The connections between the *sacra* and the *hereditas* are also shown in other non-legal accounts: Plaut. *Capt*. 775; Plaut. *Trin*. 484; Cic. *Dom*. 13.35; Plin. *Paneg*. 37.2.

[78] According to: *Sexti Pompei Festi De verborum significatu quae supersunt cum Pauli epitome. Thewrewkianis copiis usus*, ed. W.M. Lindsay, Lipsiae 1913.

down the domestic cult, formulated by nameless *pontifices*. These principles in particular are an invaluable testimony of the influence of the pontifical jurisprudence on the inheritance of the *sacra*. A comparison of the two successive orders of passing the domestic cult may be helpful for establishing the moment when the model of *usucapio pro herede* changed. The modifications of the order of passing the cult are the oldest testimony on whose basis it can be guessed until which moment in the development of the law the usucaptor *pro herede* was perceived as an heir (archaic *usucapio*), and when he was seen as an independent beneficiary of a part of the inheritance (classical *usucapio*).

As Giuseppe Gandolfi notes, the basic principle of the *sacra* in Cicero's text is not their nature or purpose, but the proclamation of their, so to say, perpetuality[79]:

> Cic., *Leg.* 2.9.22: *Sacra privata perpetua manento.*
>
> The sacred rites of families shall remain for ever.[80]
>
> Cic., *Leg.* 2.19.47: *De sacris autem* […]*, haec sit una sententia, ut conserventur semper et deinceps familiis prodantur et, ut in lege posui, perpetua sint sacra*.
>
> [...] these rites shall ever be preserved and continuously handed down in families, and, as I said in my law, that *they must be continued for ever*.

As we can see, the other principles regulating the continuation of the cult play an auxiliary role to their perpetuality, which is assumed as an axiom. The first method used to this end was passing the cult observed by the deceased to his *familia*. Each Roman family had its own separate cult, and leaving the family – for instance as a result of adoption by another one – resulted in abandoning the cult.[81] Before the introduction of the institution of *heres extraneus*, the only way a person from outside the family could receive an inheritance was adoption and therefore involving the person in the domestic cult.[82] This solution gradually lost its popularity due to some deep changes of Roman society. The *mancipatio familiae* turned out to be such a revolutionary change, which in fact deprived the *hereditas* of any significant meaning. The *mancipatio familiae* enabled the estate to be handed down to a person chosen by the potential testator, without the need to burden the beneficiary with the domestic cult. New circumstances posed an increasingly large threat to the continuation of the *sacra* of each family, which forced the College of Pontiffs to intervene. Much earlier, archaic *usucapio pro herede* was supposed to be a similar intervention in defence of the continuity of the *sacra*. It must be admitted that the source material does not allow us to date the beginning of these institutions, which vanished in the darkness of the ancient past. At one point, the *pontifices* formulated the so-called pecuniary principle (*principio pecuniario* in Italian studies of Ancient Rome), defined by Cicero in these words:

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[79] G. Gandolfi, *Sulla evoluzione della "hereditas" alla luce del regime dei "sacra"*, SDHI 1955, vol. 21, p. 225.

[80] This and the following English translations of Cicero's *Topica* quoted from: Cicero, *De re publica. De legibus*, with an English translation by C.W. Keyes, London 1959.

[81] *Ibidem*, p. 229.

[82] *Ibidem*, p. 243; G. Franciosi, *Usucapio…*, p. 94.

> Cic., *Leg.* 2.19.48: *Hoc posito haec iura pontificum auctoritate consecuta sunt, ut, ne morte patris familias sacrorum memoria occideret, iis essent ea adiuncta ad quos eiusdem morte pecunia venerit.*
>
> Clearly our present laws on the subject have been laid down by the authority of the pontiffs, in order that the performacne of the rites may be imposed upon those to whom the property passes, so that the memory of tchem may not die out at the death of the father of the family.

According to Cicero's words, the pecuniary principle is the concretisation (*hoc posito* […] *consecuta sunt*) of the general principle of perpetual continuation of the *sacra*.[83] It consists in linking the domestic cult to the estate left by the deceased the former follows the latter. Such a solution makes it possible to assign the cult to a non-heir, who obtained the estate e.g. by means of *mancipatio familiae*. It is worth noting that the solution has the characteristics of a temporary stage in the evolution of the attitude towards the *sacra*. On the one hand, they were still a value towards which a legal solution was to lead; on the other hand, they were clearly on the defensive in the face of the secularisation of the law (cf. the phrase *sine sacris hereditas*). Further concretisation consists in identifying the specific persons responsible for performing the cult:

> Cic., *Leg.* 2.20.49: […] *Nam illi quidem his verbis docebant: tribus modis sacris adstringitur: hereditate, aut si maiorem partem pecuniae capiat, aut si maior pars pecuniae legata est, si inde quippiam ceperit.*
>
> For their rule was expressed in the following terms: that men are bound to perform the rites in three different ways, either by being heirs, or by receiving the greater part of the property, or, in case the greater part of the property was bequeathed in legacies, by receiving anything whatever by that means.

This fragment is believed to be a record of a tradition of the pontifical law older than Scævola.[84] A precise dating is difficult. Traditional Romanists held that the author of these words was Tiberius Coruncanius (the *pontifex maximus* of 253 BC).[85] The basis for this opinion was another fragment from Cicero, in which the author refers to the famous pontiff:

> Cic., *Leg.* 2.21.52: *Placuit P. Scevolae et Ti. Coruncanio, pontificibus maximis, itemque ceteris eos, qui tantundem caperent, quantum omnes heredes, sacris allegari*. […]
>
> Publius Scaevola, Tiberius Coruncanius, and other supreme pontiffs have decided that those who received as much as all the heirs together were bound to the rites.

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[83] Cf. J. Zabłocki, *Kompetencje* patres familias *i zgromadzeń ludowych w sprawach rodziny w świetle Noctes Atticae Aulusa Gelliusa*, Warszawa 1990, p. 90.

[84] The nature of this statement was controversial in scholarship. Giuseppe Gandoli is most convincing on the subject when he says that this is a *responsum* based on the authority of the pontifical jurists, although it does not lack the value of normativity in the face of the pontiffs' monopoly on the interpretation of religious law (G. Gandoli, *Sulla evoluzione…*, p. 228). An older doctrine talked about an "edict" (P. Bonfante, *Corso…*, p. 103) or "ruling" (S. Solazzi, *Diritto…*, p. 108). From this point on I will call it the "response of the pontiffs".

[85] G. Gandoli, *Sulla evoluzione…*, p. 226.

According to Giuseppe Gandolfi, the principle contained in the above sentence is a modification of the order from the pontiffs' response, which is why the author dates this response to the time shortly before Coruncanius, who supposedly made the change.[86] It seems, however, that G. Franciosi is right to defend the traditional view.[87] He points out that Cicero, who was not a jurist, only passed down a certain tradition. Therefore, we should assume a certain path which was followed from the time when the pontiffs' response was created to the time when it was passed down in the orator's work. If we read the sentence literally, it seems to be talking about the mentioned figures as collaborating, or at least contemporaneous to each other. In fact, Publius Mucius Scævola was a consul in 133 BC, and the *pontifex maximus* in 134 BC. This would mean that Cicero used terms characteristic for his own times to express the pecuniary principle as unchanged whereas in fact it had undergone an evolution; it was originally formulated by Coruncanius as *maior pars*, then reworked in the light of the *lex Voconia* by Publius Mucius Scævola as a *tantundem*. In any case, the pontiffs' response in its original form can probably be dated to the first half of the 3rd century BC.

Many scholars have examined the issues contained in the famous passage,[88] but focusing on the subject of the *sacra* and the pontifical jurisprudence's views on the individual clauses of this and the next response, paying more attention only to the problems which throw direct light on *usucapio pro herede*. The text clearly distinguishes three ways of assigning someone responsibility for the *sacra* of a deceased person. Firstly, the *sacra* descended to the heirs, without any distinctions, i.e. including the heirs from outside the family – *heredes extranei*.[89] In the context of the other two groups, it can be seen that the first group was not subject to the pecuniary principle: the heir was responsible for the *sacra* regardless of accepting or rejecting the inheritance. Generally speaking, there are no doctrinal disputes on this point. This is not the case of the next clause, which is of particular interest to us: as G. Gandolfi admits, "it is unclear to what situation the pontifical norm refers".[90] The text of the clause speaks very generally about "taking as much as the heirs". What does this "taking" or "seizing" (*capere*) mean? Various authors suggest various configurations which, in their opinion, the text refers to: *usucapio pro herede*,[91] *bonorum possessio*,[92] *familiae emptor*,[93] *donatio mortis causa*,[94] and finally all

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[86] *Ibidem*, p. 226. G. Coppola Bisazza, *Studi…*, pp. 140–141 expresses the same opinion.

[87] G. Franciosi, *Usucapio…*, p. 135 ff. The author defends the view that Coruncanius introduced the pecuniary principle, but in the *maior pars* formula from the pontiffs' response, while the wording of the *tantundem* is a record of a later tradition, referring to and dependent on the *lex Voconia* of 169 BC.

[88] Cf. the extensive literature in: G. Gandoli, *Sulla evoluzione…*, p. 226, G. Coppola Bisazza, *Studi…*, p. 76 ff.

[89] According to G. Gandolfi, at first glance we can talk about this clause being superfluous, since the heir accepted the *sacra* as a family member even before the response was issued. Therefore, in his opinion, this clause was included to clearly specify *heres extraneus*. *Ibidem*, p. 231.

[90] *Ibidem*, p. 233.

[91] P. Bonfante, *Corso…*, p. 107.

[92] F.C. Savigny, *Juristische Behandlung der "Sacra privata"* [in:] *idem*, *Vermischte Schriften*, vol. 1, Berlin 1850, p. 153; E. Costa, *Cicerone giureconsulto*, vol. 1, Bologna 1927, p. 242.

[93] Ch. Appleton, *Le testament romain. La méthode du droit comparé et l'authenticité la méthode du droit comparé et l'authenticité des XII tables*, Paris 1903, p. 108.

[94] K. Karlowa, *Romische Rechtsgeschichte*, vol. 2, Leipzig 1901, p. 902.

possibilities of acquiring the inheritance without obtaining the title of heir.[95] It is evident that the question about the sense of this clause is fundamental for placing the change of the model of *usucapio* in time. If we share the opinion of the traditional doctrine, it will mean that this is the first time in the sources that the usucaptor *pro herede* was considered to be a person different from the *heres* (who is included in the first clause). Following from this, *usucapio pro herede* from this moment on does not entail obtaining this title, so it only concerns the things belonging to the inheritance (the classical model). The remaining hypotheses are of no great significance for this analysis. Suffice it to say that some of them found no support from anyone besides their authors. G. Gandolfi also shows certain helplessness towards the general nature of the text, endorsing S. Solazzi's equally general view.[96] According to the traditional opinion, the *capiat* included in the text is the abbreviated version of the word *usucapiat*.[97] It is impossible to agree with such a reasoning. Firstly, the verb *capere* is used in the sense *usucapere* – "to usucapt" – only in the fragments that are considered to be interpolated,[98] so such an interpretation is not supported by the critics of the source. Secondly, assuming a certain rationality of the writer of the pontiffs' response (as an embodiment of a tradition), he would not have used the same words for meanings so different that it would have obscured the message. Meanwhile, the word *capere* also appears in the third clause[99] in the context of the legatee with the largest share of the inheritance. In his responsibility for the *sacra*, he is limited only to the part proportionate to the property he actually acquired. It is clear that here the word *capere* appears in its common meaning of "take", "seize", "acquire" and not "usucapt", which in any case would not have made the slightest sense here. Therefore, there is no sufficient source evidence to conclude that at the time of the pontiffs' response the subject of *usucapio pro herede* was no longer the *hereditas* but *res hereditariae*. We should rather embrace the continuation of the status quo, i.e. archaic *usucapio*, which in this case was one of the ways of taking over the *sacra* in the first place, as it still resulted in obtaining the title of *heres* and acquiring the *hereditas*. The third clause, as we have mentioned, concerned the legatee who was left the majority of the inheritance by the testator, if he did accept it.[100]

The response[101] also concerns the principles of inheriting the *sacra*:

> Cic., *Leg*. 2.19.48: *Quaeruntur enim qui adstringantur sacris. Heredum causa iustissima est; nulla est enim persona quae ad vicem eius qui e vita emigrarit propius accedat. Deinde qui morte testamentove eius tantundem capiat quantum omnes heredes* […]. *Tertio loco, si nemo sit heres, is qui*

[95] S. Solazzi, *Diritto…*, p. 114.

[96] G. Gandoli, *Sulla evoluzione…*, p. 235.

[97] P. Bonfante, *Corso…*, p. 107.

[98] G. Franciosi, *Usucapio…*, p. 144 with bibliographical notes for: D. 41.2.26; D. 41.2.36; D. 41.2.43.

[99] In the second clause in the form of *coniunctivus praesentis activi*, and in the third one as *coniunctivus perfecti activi*.

[100] G. Gandolfi (*Sulla evoluzione…*, pp. 238–240) holds an isolated opinion. According to him, the legatee could be responsible for the *sacra* regardless of the *heres*, also when there simply was no heir, e.g. he rejected the inheritance. Essentially, the legacy should then be forfeited. Gandolfi claims that in order to protect the continuation of the cult the pontiffs could pass the *sacra* to the person who was supposed to take the *maior pars pecuniae* according to the testator's intention, i.e. the legatee.

[101] I will be referring to this as "Scævola's response".

de bonis quae eius fuerint quom moritur usu ceperit plurimum possidendo. Quarto qui, si nemo sit qui ullam rem ceperit, de creditoribus eius plurimum servet. [49] *Extrema illa persona est, ut, si is, qui ei qui mortuus sit pecuniam debuerit, nemini [qui] eam solverit, proinde habeatur quasi eam pecuniam ceperit.* […] [20.50] *Haec nos a Scaevola didicimus, non ita descripta ab antiquis.*

For they attempt to fix with exactness the persons who are bound to perform the rites. With respect to the heirs the requirement is altogether just; for no one else can more truly be said to take the place of the dead. Next comes the person who, either by a death-bed gift or a will, receives as much of the estate as all the heirs put together. [...] In the third place, if there is no heir, the man who acquires by possession the ownership of the greater part of the property of which the deceased died possessed is bound by the obligation. In the fourth place, if nobody acquires any of the property of the deceased, then the obligation falls upon that one of the creditors who retains most of the estate. In the last place of all stands any person who owed money to the deceased and never paid it to anyone, for his position is considered the same as if he had received that money from the estate. This is what we learn from Scaevola, but the doctrine of the older authorities is differently stated.

This time, however, it is not a record of a nameless tradition, but the author ascribes it to Scævola, his teacher. Cicero names two Scævolae as his teachers: Quintus Mucius Scævola the Augur (consul of 117, died ca. 89 BC) and Quintus Mucius Scævola the Pontifex (consul of 95, died in 82 BC).[102] Cicero's account seems to refer to the latter.[103] Scævola's response therefore talks about a situation later than the pontiffs' response, in a way referring to it. The first clause is identical, and the second in fact combines the second (*morte*) and the third (*testamento*) clause from the pontiffs' response in a version expanded by Scævola (*tantundem* […] *quantum omnes heredes*).

The third clause, however, is a complete novelty. Like the following ones, it is only a conditional clause (*si nemo sit heres*). On the one hand, the sentence clearly talks about the person who takes a share of the deceased's goods (*de bonis quae eius fuerint quom moritur usu ceperit*); on the other hand, this person is very clearly distinguished from the heir by the imposed condition and by the very separation from the first clause. Therefore, this is the first time in the sources that a person appears who usucapts things belonging to an inheritance (largest share of all the goods), who is not and will not become an heir, but is a special enough figure for the law to specify that he will be responsible for the deceased's *sacra* if there is no heir. The only solution to this puzzle seems to be the fact that sacral law faced a problem: in some way, *usucapio pro herede* stopped leading to the title of *heres*. Earlier, in the archaic model, i.e. already in the pontiffs' response, this kind of *usucapio* made it possible to continue the cult by creating a new heir. Now it stopped functioning in this way and this is why, in the face of the continuity of cults being under threat, the pontiffs intervened, increasing the group of persons who could potentially be obliged to observe the cult to include non-heirs. Undoubtedly, the third clause of Scævola's response talks about *usucapio pro herede* in the classical form.[104]

[102] Cic. *Lell.* 1.1.

[103] Cic. *Leg.* 2.20.50: *Sed pontificem sequamur.* "But let us follow the ponfiff".

[104] Cf. also P. Bonfante, *Corso…*, p. 107; S. Solazzi, *Diritto…*, p. 111 (although somewhat ambiguously); P. Collinet, *Les variations…*, p. 144; P. Voci, *Diritto…*, vol. 1, p. 114; G. Franciosi, *Usucapio…*, p. 154.

It seems that the publication of Scævola's response can be dated to the period between 130 BC (the figure of Publius Scævola, who personifies the formulation of the pecuniary principle in the *tantundem* version in Cicero's text) and 82 BC (the death of the Scævola who recorded the final form of the response in question according to Cicero's account). The change must have been made before Scævola's response was issued because the latter does not regulate the new version of the institution, but rather reacts to the already introduced changes with regard to the order of passing down the domestic cult. On the basis of comparing the two responses we can assume that the change of the model of *usucapio pro herede* occurred in the second half of the 3rd century BC or during the first seven decades of the 2nd century BC.

Clauses four and five are also completely new. They are both conditional, as they assume that *usucapio pro herede* from the previous sentence did not take place, and indirectly also that no heir appeared. In a way they concern analogous situations: one talks about the creditor of the deceased, the other – about the deceased's debtor. Moreover, Romanists are quite in agreement that putting the two together requires, or at least makes more probable, the existence of the institution of *bonorum venditio*, a universal execution in the form of an auction.[105] This involves the creditor who received the greatest share (*plurimum*) of the property after the debtor's death. The question arises as to how this creditor and not another was distinguished by receiving the *plurimum*. The clause also assumes the plurality of creditors (*de creditoribus*). Such a configuration brings to mind the procedure of an auction of the deceased's goods, similar to the *bonorum venditio* and probably its prototype.[106] If there were multiple creditors, the inheritance was divided proportionately to the size of the debts. The pontifical jurisprudence reacted to this change of execution by placing the burden of the cult on the creditor who received the largest share as a result of the auction. Earlier, during archaic *usucapio pro herede*, such a solution was not necessary, because if the creditors helped themselves out and recovered their debt from the estate of the deceased, they became the deceased's heirs after one year and as such were responsible for the *sacra* of their debtors.

In this way we have returned the third motive identified by Gaius in G. 2.55: *ut et creditores haberent, a quo suum consequerentur.* Did archaic *usucapio* indeed ensure that creditors could effectively recover their debts? It seems that the answer to this question is unclear, because creditors had to take into account the acquirement of the title of heir and the cult, which entailed some expenses. At the same time, they had a vested interest in the appearance of any other *heres*, because, let us recall, at that time execution was only personal. In this case it affected the heir. It is a perfect illustration of how the law in the Archaic Period – whether with regard to execution or usucapion – placed the personal element above the financial one. However, if there was a possibility of real execution, the heir was no longer attractive to the creditors as the "subject of execution", so it is unsurprising that creditors eagerly tried to avoid the obligation to take over the burdensome *sacra*. In spite of all, on the basis of Scævola's response the "largest"

[105] G. Franciosi, *Usucapio…*, p. 156 ff.

[106] Cf. G. 4.34–35. The execution from the deceased's estate seems to have existed already during the times of Scævola's response, so ascribing the so-called *formula Serviana* to Servius Sulpicius Rufus is an anachronism. It is possible that the latter developed an institution which existed before his times into a more mature form. Cf. G. Franciosi, *Usucapio…*, pp. 192–193, 196.

creditor was still supposed to acquire them as the one who received the largest share of the property according to the pecuniary principle. As Rudolf Jhering notes, such an application of this principle was in fact mechanical and unfair, because in the case of a proportional division this creditor gained the most but also lost the most, and thus did not recover everything.[107] Therefore, Friedrich Karl von Savigny proposes a change in the text which consists in omitting the word *de*[108]: *Quarto qui, si nemo sit qui ullam rem ceperit, [de] creditoribus eius plurimum servet.* "Fourthly, if there be no heir or legatee who receives any thing, it binds the one who gains the largest share of the estate for his creditors". In this case, the text refers rather to the *bonorum emptor*, who offered the creditors the most as payment for the debts during an auction. Such an interpretation seems attractive since a *bonorum emptor* is regarded as the successor even of a living person, but it requires an arbitrary modification of the text, which must be considered – as G. Franciosi put it – "a brutal mutilation".[109]

While the clause of the creditor requires an auction, the last one, the clause of the debtor, assumes its absence. The text talks about a debtor who did not discharge the debt, and no one sought to recover the debt from him (*nemini* [*qui*] *eam solverit*). However, in the case of a *bonorum venditio* the *bonorum emptor* became the successor of the deceased and as his creditor could seek to recover the debt from the debtor. The fragment seems to be talking about a *nemo*, i.e. taking into account that the person recovering the debt could be someone other than the heir. Therefore, if the debtor had no one to pay the debt to, the *bonorum venditio* probably did not take place at all, for instance due to the lack of inheritance assets. The last two clauses therefore complete the system of inheriting the *sacra*,[110] competing against each other with regard to the new institution of real execution.

It turns out, therefore, that Gaius' intuitions as to the motives of the introduction of *usucapio pro herede* expressed in G. 2.55 were probably correct, since changes of their bases also gave rise to changes in the very construction of the institution in question. While the quick acceptance of an inheritance by heirs always remained of a certain value as a special form of efficient legal dealings (*maturius hereditates adiri*), the other two motives underwent considerable changes. First of all, the religious element – the family *sacra* (*ut essent, qui sacra facerent*) – which originally were the most important link between the testator and the heir (*quorum* […] *summa observatio fuit*), with time started to be seen as a kind of burden. The practice of passing down the estate without the *sacra* (e.g. *mancipatio familiae*) forced representatives of the pontifical jurisprudence to formulate and develop the pecuniary principle, which, although intended to protect the inheritance of the cult in new social and economic conditions, still strengthened the understanding of the *sacra* as a secondary element, extraneous to the inherited estate in the *hereditas*. At one point, when the continuation of the cult of each family was no longer as valuable to the Romans, and secular jurists dealing solely with private law stopped being interested in religious law, the drastic model of archaic *usucapio pro herede* was

[107] R. Jhering, *Serio…*, p. 180.

[108] F.C. Savigny, *Juristiche Behandlung…*, p. 166 ff.

[109] G. Franciosi, *Usucapio…*, p. 157.

[110] *Ibidem*, p. 161.

abandoned. The effectiveness of archaic *usucapio pro herede* evolved in a similar way with regard to exhausting the claims of creditors (*ut et creditores haberent, a quo suum consequerentur*). Initially, due to the exclusiveness of personal execution, a person, not an estate, had to be found as the subject of exhaustion: namely the heir, especially since acquiring the *res hereditariae* put the creditor in danger of involuntarily acquiring the title of *heres* and the cult of *de cuius*. When the execution procedure developed and real execution was allowed, the same *usucapio* became an obstacle. Not only did it put the creditors of the deceased debtor in danger of carrying the burden of the domestic cult, if they recovered their debt from the inheritance on their own, but it also complicated the situation during and after the auction of the estate. This was because the only successor from this point on was supposed to be the *bonorum emptor*, liable to creditors. Meanwhile, the previous model of *usucapio* posed the threat of a potentially unlimited number of *coheredes* appearing, if only they took any of the *res hereditariae*. It is clear that in the new circumstances and in the new system of values the advantages of *usucapio pro herede* became more of an obstacle to legal dealings.

After this lengthy analysis of how archaic *usucapio* changed into the classical version and why, let us return to the next part of Gaius' commentary, written during the Classical Period of Roman law:

> G. 2.57: *Sed hoc tempore iam non est lucratiua. Nam ex auctoritate Hadriani senatusconsultum factum est, ut tales usucapiones reuocarentur. Et ideo potest heres ab eo qui rem usucepit, hereditatem petendo proinde eam rem consequi, atque si usucapta non esset.* 58. *Necessario tamen herede extante nihil ipso iure pro herede usucapi potest.*
>
> But at the present day it is no longer lucrativa. For a senatusconsult passed on the authority of Hadrian has provided for such usucapions to be revoked. Thus, by hereditatis petitio, the heir can recover the thing from him who has acquired it by usucapion, just as if it had not been so acquired. However, if an involuntary heir exists, no usucapion pro herede is possible even at civil law.

After the historical digression, the author returns to discussing the state contemporary to himself and his readers. Archaic *usucapio*, whose subject was the estate, is only a distant past. For over three centuries, it has concerned only *res hereditariae*, although the opinion about this institution is so awful (*inproba*) that the teacher felt obliged to explain to his students how it was created in the first place. The vital characteristics of *usucapio pro herede* stopped being timely a long time before, and the change of the model turned out to be only a failed attempt to preserve tradition. Unsurprisingly, as it gradually acquired such a bad moral opinion, it also received a poor legal assessment. Gaius writes about an unknown *senatusconsultum* enacted on Hadrian's initiative, which stipulated that the *heres* could, by means of an action to recover the inheritance, claim the things usucapted *pro herede* as if the usucapion had never taken place. Therefore, a new fictitious state is introduced, a typical method of introducing changes in Roman law, not only the praetorian one.[111] It is interesting that *usucapio pro herede* was not abolished at that time either. It was considered to be not only useless but even harmful, but still the heir was only given the possibility to contest it in a specific case. Perhaps this was a way to leave the door open for those inheritances in which heirs were not interested. It does not

[111] W. Dajczak, T. Giaro, F. Longchamps de Bérier, *Prawo rzymskie*…, p. 168.

seem credible, however, because an inheritance has the same value both to the potential heir and to the usucaptor. Perhaps we should interpret this as a trait of the individual initiative, so characteristic for Roman law[112]: the heir himself must, after all, bring an action against usucapion that took place.

The epilogue of *usucapio pro herede*

This is all that Gaius has to say about *usucapio pro herede*. We have the opportunity to compare the two models only on the basis of his commentary. Without the discussed fragment of *The Institutes*, our knowledge about usucapion in place of an heir would be infinitely poorer.[113] We would not know either the archaic origin or the special character of this type of usucapion. During an analysis of the texts of Justinian's compilation it will also appear that their interpretation would be altogether pointless if we did not have the opportunity to refer to the image depicted by the professor from the 2nd century BC. The reading of his text leaves us with the impression of *usucapio pro herede* as a dying, merely lingering institution. What we will not find in Gaius' writings is a description of the next stage of leaving *usucapio* behind. In the times of Marcus Aurelius (161–180 AD) a new crime was defined, called the *crimen expilatae hereditatis*.[114] As S. Solazzi claims, such behaviour had been punished even earlier, by means of *cognitio extra ordinem*, on the basis of a custom confirmed by the Emperor-Philosopher.[115] In his monograph about the office of proconsul, Ulpian clearly states that the *crimen expilatae hereditatis* was in a sense an institution subsidiary to the *actio furti*.[116] The punishment for this deed was lifelong or temporary public works, and for higher-born persons – temporary

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[112] Cf. e.g. D. 47.10.7.5. *in fine*: […] *nulla iniuria est, quae in volentem fiat* "because there is no affront where the victim consents"; and D. 22.6.9.5, *in fine*: […] *nec stultis solere succurri* "that relief is granted to those who err, not to fools".

[113] According to Stanisław Wróblewski, Gaius is simply the jurist "to whom we owe almost everything we know about *usucapio pro herede lucrativa*". Cf. S. Wróblewski, *Usucapio…*, p. 218.

[114] D. 47.19.1. Marcianus, book 3 of *The Institutes*: *Si quis alienam hereditatem expilaverit, extra ordinem solet coerceri per accusationem expilatae hereditatis, sicut et oratione divi Marci cavetur*. "If someone plunder the inheritance of another, he is to be punished by extraordinary process on being charged with such offense, as is laid down in a proposal of the deified Marcus".

[115] S. Solazzi, *Sul crimen expilatae hereditatis* [in:] *idem*, *Scritti di diritto romano. III (1925–1937)*, Napoli 1960, p. 547. Solazzi claims so quoting the above fragment as well as C. 9.32.6. Philip.: *Expilatae hereditatis crimen loco deficientis actionis intendi consuevisse non est iuris ambigui*. "It is a well-settled rule of law that the crime of plundering an estate can be prosecuted, even where a civil action for the same cause has failed". (*The Codex of Justinian: A New Annotated Translation with Parallel Latin and Greek Text*, vol. 3, Books VIII–XII, general ed. B.W. Frier; eds. S. Connolly, S. Corcoran, M. Crawford, J.N. Dillon, D.P. Kehoe, N. Lenski, Th.A.J. McGinn, Ch.F. Pazdernik, B. Salway; with contr. by T. Kearley; based on a trans. by J.F.H. Blume, Cambridge University Press, 2016). According to S. Solazzi, Emperor Philip would not have referred to a custom if Marcus Aurelius had introduced the *crimen*, and the failed civil action (*actio deficiens*) was the *actio furti*.

[116] D. 47.19.2.1. Ulpianus, book 9, *On the Duties of Proconsul*: *Apparet autem expilatae hereditatis crimen eo casu intendi posse, quo casu furti agi non potest, scilicet ante aditam hereditatem, vel post aditam antequam res ab herede possessae sunt* […]. "It is clear that this offense can be alleged in a case where no

exile.[117] As a result of introducing the *crimen*, the only possible application of usucapion in place of an heir was the case of the possessor of *res hereditariae* who was in good faith about the fact of being an heir.[118] All the more significant and spectacular consequences, so aggravating to the widespread moral opinion, had irrevocably ended.

Recapitulation

This concludes the history of *usucapio pro herede* before the close of the Classical Period: from a remedy to protect family and religious values to a severely punished crime. The oldest sources about usucapion come from the Law of the Twelve Tables,[119] while a millennium later Justinian devoted almost the entire 41st book of his *Digest* to the subject. Over such a long period of time, the institution evolved, developing in response to social changes which brought with them new needs. *Usucapio pro herede* is a particular example of usucapion. Initially, this kind of *usucapio* consisted in the possibility of taking the title of heir and the entire inheritance by possessing *res hereditariae* for a year. It was only later that the subject of usucapion became *res hereditariae* rather than the *hereditas* itself. Usucapion in place of an heir was created – as the first separately named type of usucapion – already in the Archaic Period, when the requirements of good faith and a just basis for acquiring possession which led to usucapion, worked out much later, were not known yet. In this respect, *usucapio pro herede* did not change and even in *The Institutes* of Gaius it was an exception to the principle of the good faith of the usucaptor. With time, the Romans developed an increasingly bad opinion about the different nature of this type of usucaption. The fact that during quite a short period of time any person could, in bad faith, take over the entire inheritance in the name of the law certainly raised objections. In his textbook, Gaius openly described usucapion in place of an heir as "dishonourable". It is therefore unsurprising that a *senatusconsultum* enacted on the initiative of Emperor Hadrian enabled heirs, by means of a *hereditatis petitio*, to recover usucapted *res hereditariae* based on the fiction of a lack of usucapion. In this way, the majority of cases of the actual application of *usucapio pro herede* was blocked. What contributed to the total marginalisation of the institution was the introduction of the *crimen expilatae hereditatis*, ascribed to Emperor Marcus Aurelius. The criminalisation included such deeds with regard to *res hereditariae* which would normally be subject to the *actio furti*. It was no longer possible to possess *res hereditariae* in bad faith, including vacant inheritances. The law prescribed severe punishment for the persons committing the *crimen*, including temporary exile and infamy. The only possible legal application of *usucapio pro herede* remained the case of a possessor of *res hereditariae* who believed himself to

action for theft can be brought, that is, before the inheritance has been accepted or, although it has been accepted, the heir has not taken possession of the assets…"

117 Cf. D. 47.18.1.1.

118 Cf. J. Krzynówek, *Uwagi…*, p. 161.

119 T. 7.4.

be the heir. In this context it may be surprising that there was a place for a chapter about *usucapio pro herede* in Justinian's compilation.

It is impossible to disregard the influence of non-legal factors on the development of *usucapio pro herede*. We should firstly mention the respect for the traditional domestic cult, which was the motive behind its creation. Some centuries later, the public opinion, outraged at the phenomenon of depriving rightful heirs of their inheritance, caused the marginalisation of this form of usucapion. The Justinian law preserved it, although only in a very limited scope, which was, however, morally acceptable, as it introduced the requirement of good faith. The experience of the application of *usucapio pro herede* clearly showed that finding the heir is always a value in itself, although not an absolute one. *Usucapio* was quite effective in finding any heir, but it also posed the threat of quick appropriation. Moreover, it still did not solve the problem of a *hereditas damnosa*. No one was interested in usucapting an inheritance which consisted mostly of debts. From the times of Augustus, the Roman practice turned to bodies governed by public law taking over vacant successions. Interestingly, the solutions adopted by the Polish legal system show that the contemporary legislator also accepts Augustus' idea. At the same time, inheritance law does not allow the institution of usucapting an inheritance at all. As we can see, the experience of the Romans, who – realising that the price was too high – gave up usucapion in place of an heir, can be regarded as timely even in the present day.

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